

TO: Members of the Advisory Committee and Interested Parties

RE: Parent Manual

The Office of Administrative Hearings, pursuant to its interagency agreement with the California Department of Education, has prepared the attached draft of a parent manual.

The purpose of this parent manual is to provide a general overview of the due process and mediation process that will assist interested parties in accessing these services. The Parent manual should include detailed guidance for parents in areas related to due process hearings and mediation in at least the following areas:

- How to file a due process complaint
- Describes mediation, how to prepare for mediation and participate in mediation
- Properly communicate with the hearing office and other parties
- How to compel attendance of witnesses and compel production of documents
- How to prepare for a due process hearing
- Proper presentation of evidence
- How to access applicable statutes and regulations
- How to file and serve pre-hearing motions
- How to research and locate special education decisions issued by the contractor

The attached manual is a DRAFT and comments from the advisory committee and interested parties is requested. Please provide your comments and suggested changes in writing no later than December 1, 2008. Please address all of your comments to the attention of Presiding Administrative Law Judge Sherianne Laba. Comments can be submitted via email at speced@dgs.ca.gov, via facsimile at 916-376-6319, or via mail to Office of Administrative hearings, 2349 Gateway Oaks Drive, Suite 200, Sacramento, Ca 95833.

Thank you

Sherianne Laba
Presiding Administrative Law Judge
Office of Administrative Hearings
Special Education Division

PARENT MANUAL

SPECIAL EDUCATION DISPUTE RESOLUTION



California Office of Administrative Hearings

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Welcome to the Office of Administrative Hearings

The mission of the Office of Administrative Hearings is to provide a neutral forum for fair and independent resolution of matters in a professional, efficient, and innovative way, ensuring due process and respecting the dignity of all.

The Office of Administrative Hearings (OAH) is a quasi-judicial tribunal, similar to a court, but less formal. OAH is divided into two, statewide divisions. The Special Education Division has three regional offices located in Sacramento, Van Nuys, and Laguna Hills. It is estimated that there are over 700,000 children with special needs in California's schools. OAH provides adjudicatory, mediation, and settlement services throughout the state to parents and school districts of these special needs children.

Special Education Division Offices

(916) 376-6319 Fax for all offices
(916) 274-6035 After hours cancellation/settlement line

Sacramento
2349 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833-4231
(916) 263-0880

Van Nuys
15350 Sherman Way, Suite 300
Van Nuys, CA 91406
(818) 904-2383

Laguna Hills
23046 Avenida De La Carlota, Suite 750
Laguna Hills, CA 92653
949-598-5850

Disclaimer. This manual is not intended, nor should it be construed in any way, as legal advice. This manual does not extend or limit the jurisdiction of OAH as established by law

and regulation. Nothing in this manual shall limit the discretion of Administrative Law Judges to act in accordance with law and regulation.

Revisions. OAH reserves the right to amend, suspend, or revoke the text of this manual at any time in its discretion. For information on how to get the most current version of this manual, see chapter/section/forms below. For information on how to provide comments regarding this manual, see chapter/section/forms below.

DRAFT

INTRODUCTION

Disability is a natural part of the human experience. The United States Congress recognized that fact when it enacted the Individuals with Disabilities Education Act commonly referred to as IDEA. (20 U.S.C. section 1400, and following). The California Legislature has stated its intention to ensure that children with special educational needs are provided their rights to appropriate programs and services which are designed to meet their unique needs under IDEA.

If a child with a disability's parent and school cannot reach agreement on appropriate programs and services, OAH will resolve the dispute.

SCOPE OF THIS PARENT MANUAL

The Office of Administrative Hearings (OAH) is charged with administering the procedural safeguards under the IDEA. The California Department of Education (CDE) has tasked OAH with the responsibility for issuing this parent manual.

This manual is designed to assist parents in understanding and working through California's special education dispute resolution system. It describes how to request and prepare for mediation and how to file and prepare for a due process hearing.

OAH also offers outreach training sessions throughout California. A complete listing of OAH outreach training sessions and the agencies sponsoring those sessions is available on the OAH website.

Staff in the Sacramento Special Education office are available to assist parents in further understanding the process and answering questions regarding their case. The Sacramento phone number is 916-263-0880. Information is also available on the offices' web site: www.oah.dgs.ca.gov.

WHAT IS OAH?

OAH's Special Education Division provides Administrative Law Judges (ALJ) who provide mediation and settlement services throughout the state to school districts and parents of children with special needs. When parents and districts are unable to resolve their dispute through mediation or settlement, OAH provides an ALJ to hear and decide the dispute. The ALJ will hear evidence from both sides through due process hearing. The ALJ will then consider the evidence and issue a decision on the appropriate placement and services for the student.

HOW TO FIND INFORMATION ON AN ADMINISTRATIVE LAW JUDGE (ALJ) OR MEDIATOR

OAH maintains current biographical information about its ALJs on its website. The OAH website can be found at: www.oah.dgs.ca.gov. The Special Education tab includes a listing of ALJs who hear special education matters and their educational background.. This is not intended to be a complete professional biography of each ALJ.

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CHAPTER 1 – IN THE BEGINNING

The special education dispute resolution processes described in this manual are formal resolution processes designed to assist you when you and the district are unable to resolve the dispute.

CASES THAT OAH IS AUTHORIZED TO HEAR

OAH can conduct due process proceedings only when it has jurisdiction, or the legal authority, to act. OAH conducts mediations or due process hearings whenever parents and school districts disagree regarding the identification, evaluation, educational placement and services for their child with special needs or the provision of a free appropriate public education for that child.

CASES THAT OAH IS NOT AUTHORIZED TO HEAR

If a case does not involve the identification, evaluation, placement, or the provision of a free appropriate public education (FAPE) for a child with a disability, OAH does not have authority to hear the case.

Examples of the types of cases that OAH does NOT have authority to hear include the following:

- A compliance complaint that should be directed to the CDE. For example, CDE's compliance office is the proper place to file a complaint that a school will not permit review of school records.
- Claims related to enforcement of OAH's orders and decisions.
- A claim relating to a Section 504 Plan under the Rehabilitation Act.
- A claim for violation under the Americans with Disabilities Act.
- A claim for civil rights discrimination under 42 U.S.C. Section 1983.
- A claim for violation of the No Child Left Behind Act (NCLB), including teacher qualifications under NCLB.

WHAT ARE THE DISPUTE RESOLUTION OPTIONS?

When a disagreement arises about a child who has (or is suspected of having) special education needs, the parent or the educational agency may send OAH a request for assistance in (this is called a "complaint") in resolving the dispute.

The request may be either a Request for due process hearing or Request for mediation-only. All requests for assistance are filed in the Sacramento office.

WHAT IS THE DIFFERENCE BETWEEN MEDIATION-ONLY AND A DUE PROCESS HEARING?

Mediation is a voluntary, confidential, informal meeting at which the parties and an experienced, impartial mediator attempt to resolve the dispute in a cooperative, non-adversarial atmosphere. The mediator does not provide advocacy or legal advice to either side, but facilitates communication between the parties. The participation of the neutral mediator makes it more likely that the parties will reach a mutually satisfactory resolution. Over 70% of mediations successfully resolve the dispute.

In a "Mediation-Only" which is a mediation that takes place without requesting a due process hearing. The purpose of the mediation-only is to resolve the dispute without initiating what is in essence a lawsuit against the district. The law specifically excludes attorneys and advocates from attending a mediation-only. By excluding attorneys and advocates, the mediator can facilitate the mediation process in a truly non-adversarial setting, and provide a forum for non adversarial resolution.

When you file a request for due process hearing, you have, in essence, instituted a lawsuit against the school district. It is a more formal, trial-like legal proceeding in which all parties are given a chance to present evidence and arguments before an impartial ALJ. The ALJ then issues a written decision which resolves the matter.

WHO MAY FILE A COMPLAINT?

A parent or legal guardian of a student who has a disability (or suspected of having a disability) may request a hearing or mediation. A school district or other educational agency, such as the county mental health department, may also make such a request. In some cases, the student may make a request. Each side of the disagreement is referred to as a "party."

HOW DO I MAKE A COMPLAINT?

To begin the process, a "Request for Due Process Hearing and Mediation" (**FORM 1**)¹ or a "Mediation Only Request Form" (**FORM 2**) must be sent to OAH. You can write your complaint in letter form or use these forms developed for these purposes.

WHERE CAN I OBTAIN THE REQUEST FOR DUE PROCESS HEARING FORM AND THE MEDIATION-ONLY FORM?

These forms are contained in the appendix to this guide. You can also obtain these forms on OAH's website at www.oah.dgs.ca.gov or by writing or telephoning the Office of

¹ Samples of all forms referenced in this parent manual are available in the appendix .

Administrative Hearings, Special Education Division, 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833, (916) 263-0880. Forms may also be obtained by contacting the California Department of Education at (916) 319-0800 or by visiting their website at www.cde.ca.gov.

DO I HAVE TO USE THE FORMS?

No, you do not have to use these forms. A letter or other writing will be sufficient so long as it contains the required information.

WHAT INFORMATION MUST BE INCLUDED?

Your request for Due Process Hearing or Mediation must include the following:

The name and residence address of the child, the name of the school the child is attending.

- A description of the problem including facts relating to the problem.

Be specific and describe the how, what, when, where and why of your complaint. Be sure to include dates such as which school year or years and the date or dates of the IEP involved in your complaint.

- A description of the resolution you desire. In other words, describe the placement or services you want.

WHAT IF I NEED ASSISTANCE IN FILLING OUT THESE FORMS?

You may contact OAH at anytime to ask questions about the dispute resolution process. Please remember that OAH cannot give legal advice. For parents that wish to receive assistance, OAH can provide you with a free/reduced cost attorney and advocate list. This list is also available on our website www.oah.dgs.ca.gov.

WHAT IF I NEED AN INTERPRETER?

OAH provides interpreters at no cost to parents. If you require the assistance of an interpreter please be sure to include this request in your letter or on the form and indicate the language the interpreter must speak.

WHAT DO I DO WITH THE COMPLETED FORM?

All due process requests and mediation-only requests must be sent to Sacramento and *not* to the regional offices. The request may be sent via facsimile (fax) to (916) 376-6319, or hand delivered or mailed to the Office of Administrative Hearings, Special Education Division, 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833.

At the same time that the form is sent to Sacramento, you, the party requesting a due process hearing, must send or deliver a copy of the request (complaint) to the other party or parties. The school district will always be one of the parties. Other parties may include, for example, the county mental health department. You must indicate somewhere on your letter or the form that you send to OAH that you have sent the other parties a copy of that letter or form. This is called a “proof of service”. If you do not provide a copy to the district or other parties your request (complaint) may be dismissed.

For example, if you send a letter, you can type or write the name and address of the person to whom you sent it at the bottom of the page. You can also use a form called a Proof of Service developed for this purpose **(FORM 3)**.

If you mail the form, you may want to consider sending the form with a return receipt requested or sending it certified mail so that you have a record (document) showing the other party received your complaint.

WHAT IF THE DISTRICT HAS FILED A COMPLAINT AGAINST MY CHILD?

Although students file the vast majority of complaints with OAH, sometimes districts file complaints with OAH. Perhaps the most common of these are complaints that the district be allowed to assess the student. Districts also are required to file a complaint with OAH if the parent disagrees with a district assessment and requests an Independent Educational Assessment, but district denies that request. Sometimes districts file a complaint after making an IEP offer to a student. In this type of complaint, the district is requesting that OAH determine that the offer constitutes a FAPE.

WHAT HAPPENS AFTER A REQUEST IS FILED?

Once a complaint is received OAH will send you a “Scheduling Order and Notice of Due Process Hearing and Mediation” (Scheduling Order). **(FORM 4)** This scheduling order gives you dates on which certain events will happen. The scheduling order also gives you important information about the process and the name of the calendar clerk assigned to your case. The calendar clerk is your point of contact for all questions related to your case. Please read your scheduling order carefully and in its entirety. If you have questions call your calendar clerk.

CHAPTER 2 - THE RESOLUTION MEETING

WHAT HAPPENS IN THE FIRST 30 DAYS AFTER YOU FILE YOUR REQUEST FOR DUE PROCESS HEARING?

Within the first 30 days after the request for due process hearing is made (filed), the parties must have a meeting called a "resolution session." A resolution session is only required if parents file a due process complaint. It is not required if the school district files its own due process complaint. The resolution session is mandated by federal law. The process contained in this chapter is consistent with federal law. A resolution session is not required if you file a mediation-only case.

WHEN IS THE RESOLUTION SESSION HELD?

It is the responsibility of the school district to schedule and proceed with the meeting. A school district must arrange to hold a resolution meeting within fifteen (15) calendar days (not school days or business days) from when the district received notice of a due process complaint from you. The fifteen days begins the date you deliver your complaint to the district, or the date the district receives it from you by fax or by mail.

DO I HAVE TO PARTICIPATE IN THE RESOLUTION SESSION?

Yes. The resolution process is mandatory not voluntary. If either the district or the parents decline to participate in the resolution process, certain consequences may occur.

If the parents do not participate in the resolution meeting, and the parties have not otherwise waived (agreed not to meet) in writing, a due process hearing shall not take place until the parties hold the meeting. If the school district is unable to obtain your participation in the resolution meeting after the school district has made reasonable efforts to obtain it, and the school district can document those attempts, the school district may request OAH to dismiss the complaint. OAH has the discretion to dismiss the complaint if the parents demonstrate an unwillingness to participate in the resolution process.

If the school district does not convene a resolution meeting within the required time or is unwilling to participate in the process, parents may request that OAH immediately set the due process complaint for hearing.

IS THERE A WAY TO CANCEL THE RESOLUTION SESSION?

The parents and the school district may agree to cancel (meaning to waive or to give up) the resolution meeting. **(FORM 5)**. When the parties waive the resolution session they must provide OAH with a written agreement to waive signed by both parties. When OAH receives a written waiver of the resolution meeting signed by both parties, the matter proceeds directly to mediation and hearing.

PURPOSE OF A RESOLUTION SESSION

The purpose of the resolution meeting is for you and the school district to discuss the due process complaint and supporting facts. A resolution meeting gives you and the school district a chance to work together to avoid the due process hearing.

The meeting is an opportunity for you and the district and any other parties to come to a decision on your child's education yourselves, rather than having a decision made by an Administrative Law Judge in a due process hearing.

The resolution meeting can help repair relationships and lines of communication between you and the school district that may have broken down.

Although there is no guarantee that you will reach an agreement during the resolution meeting, if you and the school district do reach an agreement, it is legally binding and enforceable in state or federal court.

CAN I BRING MY ATTORNEY TO THE RESOLUTION SESSION?

The resolution meeting is designed to be less adversarial than a due process hearing. You do not have to bring an attorney to the meeting. If you do not bring an attorney, the school district may not bring an attorney. If you do bring an attorney, then the school district may bring its attorney.

IS THERE A COST FOR THE RESOLUTION SESSION?

There is no cost to you for the resolution meeting, unless you bring an attorney with you and the attorney charges you for his or her time at the meeting. Unless you have an attorney involved in the resolution process, the only cost to you is the time to prepare and participate in the meeting. The parties may agree in a settlement agreement that the school district pay the fees for your attorney, but it is not a requirement and a school district may take the position that it will not pay your attorney's fees.

WHAT IF THE CASE IS SETTLED IN THE RESOLUTION SESSION?

If the case is settled at the resolution meeting, then both parties sign a settlement agreement. The parties must notify OAH in writing that the case has settled. A letter indicating the case has settled must be faxed to OAH at 916-376-6319.

WHAT IF THE CASE DOES NOT SETTLE DURING THE RESOLUTION SESSION?

The due process proceedings will continue if you do not reach an agreement at the resolution meeting. As a part of the Scheduling Order you receive after you file your case, OAH

calendars a voluntary mediation to be held between the parties approximately 35 days after you file a due process complaint. OAH calendars an initial hearing date for approximately 55 days after parents file the complaint.

If no communication is received, OAH will assume that the resolution meeting was unsuccessful and the matter will proceed to mediation and hearing on the dates calendared in the scheduling order.

WHAT IF THE SCHOOL DISTRICT DOES NOT IMPLEMENT THE AGREEMENT?

The settlement agreement is a legal document that can be enforced by either party by filing a compliance complaint with CDE or by filing a complaint in state or federal court. OAH does not have authority to enforce these agreements.

WHAT IF I ENTER AN AGREEMENT AND THEN HAVE SECOND THOUGHTS ABOUT IT?

Either you or the school district can withdraw from any agreement that is reached at the resolution meeting within three business days of the agreement's execution. If the agreement is cancelled, then the due process hearing goes forward. After three business days, the agreement is final.

WHAT IS THE DIFFERENCE BETWEEN A RESOLUTION SESSION AND MEDIATION?

Congress added the resolution session to the law as another means of assisting parents and school districts to directly resolve their differences without the need for a due process hearing. In a resolution session:

- There is no third party, such as a mediator or Administrative Law Judge, to assist the parties' discussions and settlement process.
- If you do not bring an attorney, the district may not bring one.
- There is a three-day rescission period after a resolution agreement is reached. This means that you or the school district may change your mind and decide to withdraw from the agreement within three days of signing it. You do not have the same right of rescission after signing a mediation settlement.
- The confidentiality of discussions is not protected in the same way that it is in the mediation process (as is further discussed below) unless the parties make confidentiality a part of the settlement agreement.

WHO ATTENDS THE RESOLUTION SESSION?

You and the school district determine which members of the individualized education program (IEP) team will attend the resolution meeting. Participants should include you, a school district representative who can make decisions on behalf of the school, and any IEP team member who has relevant information about the issue that the parties will discuss at the meeting. Sometimes, it may be appropriate to have your child attend the meeting as well. This is a decision that you must make. You may also have an advocate or supporting friend attend with you and/or help you prepare for the meeting. School districts may not bring an attorney to the resolution meeting unless you bring an attorney.

HOW DO I PREPARE FOR THE MEETING?

There is no required agenda for a resolution meeting. The school district, however, is likely to take the lead in the discussion, so it is very important that you prepare for the meeting in advance. Here are some suggestions for preparing for the meeting:

- Prepare a statement that addresses all issues in the complaint, outlines what you believe your child needs, and includes ideas for possible solutions, which you believe will resolve the situation. It is helpful to come prepared to discuss, and be open to, a variety of possible solutions.
- You should organize your documents, recording dates and notes on them. You should bring to the meeting any documentation that supports your position regarding your child's educational needs, such as testing or assessments that you may have obtained on your own, which you may not have previously given to the school district.
- If you are uncomfortable in this type of meeting, or if you do not have experience with settlement discussions, it may help you to practice making your statement to an advocate, a family member, or a friend before going to the resolution meeting.
- It may be helpful to identify sections of the law or regulations with which you feel the school district may not be complying.
- It is also helpful for you to anticipate questions the school district may have or responses they may have to your position or suggestions, and be ready to answer the questions or respond to the school district's position with concrete examples.
- These meetings may be very emotional for you. It may be helpful to be prepared for the emotion and try to focus on future solutions rather than past problems. Be prepared to listen to the points raised by the school district. If you and the district staff listen carefully to each other, the meeting is more likely to result in an agreement.

CHAPTER 3 - MEDIATION

WHEN IS MEDIATION AVAILABLE?

There are two situations when mediation is available to you: (1) when you have filed a request for mediation-only; (2) when you have filed a request for due process hearing.

WHAT IS MEDIATION-ONLY?

Either you or a school district may file a request for “Mediation-Only” with OAH. A mediation-only request does not start the due process proceedings and OAH does not schedule a due process hearing. Neither you nor the school district may have an attorney participate in the mediation. If you do not resolve your dispute, the parties do not proceed to due process hearing and OAH closes the case. However, if your mediation-only case is closed you may still file for due process hearing.

Mediation is a preferred method for resolving disputes for a number of reasons. The parties are more likely to maintain a cooperative relationship in the future if the settlement of the dispute is by mutual agreement. The parties have a great deal of flexibility in reaching a mutually acceptable settlement/written agreement. When the dispute goes to hearing, the ALJ makes the final decision, which may not be completely satisfactory to either party. Mediation is less costly than a hearing in terms of time, money, and personal stress.

WHEN IS MEDIATION A PART OF DUE PROCESS HEARING REQUEST?

After a parent files a request for due process hearing, OAH will schedule a mediation date for approximately 35 days after the request is filed, in order to give the parties sufficient time to hold a resolution meeting. The date and location will be contained in the Scheduling Order you receive. If the district filed the due process request, OAH will schedule the mediation for approximately 15 days after the district files its request.

HOW CAN I RESCHEDULE THE MEDIATION DATE IF I CANNOT ATTEND ON THE DATE SCHEDULED?

OAH will reschedule the initial mediation if all parties agree to a new date. All parties simply execute the form setting the new agreed upon mediation date. **(FORM 6)**. Mediation is a voluntary process and either party can elect, at anytime, to cancel the mediation.

For non-Los Angeles Unified School District (LAUSD) cases, OAH schedules a mediation to last from 9:30 a.m. to 5 p.m. Generally, there will be a break for everyone to have lunch during the course of the mediation. If a settlement is going to be finalized on the day the mediation takes place, the parties normally will need to start drafting the agreement no later than 3:00 p.m. LAUSD are either in the morning, from 9:00 a.m. to about 12:30 p.m., or in the afternoon, from 1:30 p.m. to 5:00 p.m.

WHAT IS THE PURPOSE OF MEDIATION?

Unlike the resolution meeting, mediation is a voluntary process that brings you and school district representatives together to work with each other to resolve disagreements about the education and services for your child with special needs

The mediator is a neutral third party who helps the parties communicate their concerns to each other.

With the assistance of the mediator, all parties are involved in the decision-making process and everyone has an opportunity to express concerns, offer opinions, make suggestions, and generate solutions.

The focus of the mediation is on solving the disagreements between you and school district staff and on arriving at a solution that satisfies all the parties.

The mediation discussions are confidential. Therefore, the discussions during the mediation cannot be used in future proceedings between the parties.

There is no cost to you for the mediation except for cost of legal representation if you chose to hire an attorney.

WHAT IF ONE OF THE PARTIES DOES NOT WANT TO PARTICIPATE IN MEDIATION?

Since the process is voluntary, either you or the school district may cancel (waive) mediation if either of you does not wish to participate. There is no requirement that a party provide any reason for its decision to decline to participate in the mediation process. OAH will cancel the mediation if either the school district or you notify OAH that they do not wish to participate.

If both or all parties later decide that mediation will be helpful, OAH will reschedule a mediation date. Mediation is available at any time to the parties, even during a due process hearing.

WHO ARE THE MEDIATORS?

The mediator is an Administrative Law Judge. All ALJs were lawyers before becoming judges and have received extensive training both in mediation and special education.

WHAT IS THE ROLE OF THE MEDIATOR?

Under federal and state law, the mediator must be someone who has received specific training in mediation and who is knowledgeable regarding special education and related services laws and regulations.

The role of the mediator is *not* to act as a judge and make factual findings and/or conclusions of law about the issues.

- The mediator is there to facilitate open communication between you and the district and any other party.
- The mediator attempts to create a safe environment that permits the parties to interact with each other and communicate their differences as well as their points of agreement.
- The mediator assists the parties in understanding each other's viewpoint and ultimately attempts to help them reach a mutually satisfactory resolution to the dispute.
- The mediator is also there to clarify points of agreement and disagreement between the parties, to assist in identifying options that may be available to resolve the case.
- The mediator is there to assist as a disinterested party, who is unbiased and impartial, and who has no stake in the outcome of the case.

WHAT IS THE DIFFERENCE BETWEEN MEDIATION AND A RESOLUTION SESSION?

At mediation a mediator assists the parties in reviewing the issues, considering each party's positions, and in considering possible options to resolve the disputes. In the resolution meeting, you directly negotiate with the district.

In mediation there is no statutorily required three-day rescission period that permits any party to change their mind after signing a mediation settlement agreement and withdraw from the settlement. Once all the parties sign the mediation settlement agreement, it is binding upon all the parties who signed it.

The discussions during the mediation are confidential and may not be used against the other party in the due process hearing or in other litigation. Resolution sessions do not have the same level of confidentiality.

WHO GENERALLY ATTENDS THE MEDIATION?

Participants include you, a school district representative who can make decisions on behalf of the school, and any IEP team member who has relevant information about the issue that the parties will discuss at the meeting.

The parties may bring an attorney to the mediation unless the request is for mediation-only. You may also have an advocate or supporting friend attend with you and/or help you prepare for the mediation.

HOW DO I PREPARE FOR THE MEDIATION?

Preparation for the mediation is similar to the preparation for a resolution session. As in a resolution meeting, there is no required agenda for the mediation. However, unlike a resolution meeting, where the school district is likely to take the lead in the discussion, the mediator will start the discussions at the mediation.

The following are some suggestions for parents in preparing for the mediation. If an attorney or advocate represents you, you should discuss the mediation with them. Your attorney or advocate will most likely discuss what you need to do to prepare for the mediation and who will be making the initial opening remarks regarding the disputes in the case.

- You may want to outline what you believe your child needs, and include ideas for possible solutions, which you believe will resolve the situation. It is helpful to come prepared to discuss, and be open to, a variety of possible solutions.
- You should organize your documents, recording dates and notes on them. You should bring to the meeting any documentation that supports your position regarding your child's educational needs, such as testing or assessments that you may have obtained on your own, which you may not have previously given to the school district.
- It may be helpful to identify sections of the law or regulations with which you feel the school district may not be complying.
- It may be helpful for you to anticipate questions the school district or mediator may have or responses they may have to your position or suggestions, and be ready to answer the questions or counter the school district's position with concrete examples.
- Like resolution meetings, mediations can be very emotional for you. It may be helpful to be prepared for the emotion and try to focus on future solutions rather than past problems.
- You and the school district should try to listen to each other's points. If you and the district staff listen carefully to each other, the meeting is more likely to result in an agreement. If an attorney or advocate represents you, it may be helpful to discuss the issues, and possible solutions, with them in advance.

WHAT HAPPENS AT MEDIATION?

It is not the purpose of a mediation to have a mediator make decisions about the educational placement and services for your child with special needs. Rather, the mediator's purpose is to facilitate discussion between you and the school district so that you, not an ALJ, make the decisions about programs and services for your child. The parties work together and they are in control of the outcome.

WHAT ARE THE BENEFITS OF MEDIATION?

Mutual agreements generally result in greater satisfaction for all parties.

Mediation assists everyone better to understand differing points of view.

Mediation may be less costly than going to hearing and disagreements are resolved more quickly than traditional litigation procedures.

Written agreements resulting from mutual resolution frequently result in higher rates of compliance.

At times, resolutions may be possible in a mediation that would not be ordered by an ALJ in an administrative proceeding.

Most importantly, the parties control the outcome of the mediation.

WHAT ARE THE NUTS AND BOLTS OF THE MEDIATION PROCESS?

The mediator will generally greet the people attending the mediation, introduce him or herself, and seat everyone at a table.

The mediator introduces himself or herself to the parties and introduces the participating people to one another if they have not all previously met.

The mediator then will generally give some introductory remarks explaining the purpose of mediation, explaining what the mediator's role is in the process, and how the mediation will proceed.

If you have questions about the process or any aspect of the mediation, you should feel free to ask at any time.

The mediator also will ask all the parties present to sign in on an OAH form that shows who participated in the mediation.

After introductory remarks by the mediator, the mediator will ask the party who filed the due process request or request for mediation-only to give an overview of the issues in the case, what issues have been resolved, if any, and what issues are still in dispute, and why the parties have a disagreement.

When the filing party has finished, the mediator will ask the other party to give its perspective on the issues. Afterward, the mediator will assist the parties in discussing each issue and ideas for resolving the dispute.

At times, the parties may ask to speak alone with the mediator, outside the presence of the other party. At this point, the school district staff will generally go into another room so that you can have private discussions with the mediator. This is called a caucus. The mediator will first meet with one party and then go into the room where the other party is waiting to meet privately with them. At times the parties may ask to caucus without the other side and without the mediator present. Each mediation is different. It is possible that throughout the

course of the day, the parties will caucus alone or with the mediator several times during the mediation. Settlement offers may be discussed during the caucuses and the parties may ask the mediator to convey offers and counter offers to the other party.

With the exception of LAUSD cases, mediations may last an entire day. If necessary, and at the request of both parties, the mediator will continue the mediation to another day if the discussion is ongoing and the parties believe that another day of mediation will be beneficial.

WHAT HAPPENS IF WE SETTLE THE DISAGREEMENT AT MEDIATION?

The parties may resolve some or all of the issues at the mediation. If you reach a settlement in full or in part, the parties must confirm their agreement in a written settlement document which is drafted by the parties.

The parties and their representatives will review the settlement language and make suggestions and changes as necessary. After the parties and their representatives have all agreed on the terms and language of the settlement agreement, the parties will sign the document.

Sometimes, a school district's internal rules may require that its school board approve the agreement. If that is the case, the settlement agreement will generally include a statement to that effect.

Once the mediated settlement agreement is signed and final, the mediator will have the parties sign a form which dismisses the case. The mediator does not sign the settlement agreement because he or she is not a party to the agreement.

WHAT HAPPENS IF NO AGREEMENT IS REACHED AT THE MEDIATION?

The due process proceedings will continue if the parties do not reach an agreement at the mediation. If agreement is not reached, the case will proceed to a due process hearing. A prehearing conference may also be scheduled before the due process hearing if requested by the parties. The mediator will discuss with the parties the dates for the prehearing conference and hearing to confirm the existing dates or to set new dates. You should have in mind that mediation is available at any time during the due process proceedings. If the parties believe it will be helpful to have an additional mediation, they should make the request to OAH which will then calendar another mediation date.

CHAPTER 4 - SETTLEMENT CONFERENCE

IS THERE ANY OTHER PROCESS AVAILABLE TO ASSIST THE PARTIES IN SETTling THEIR DISAGREEMENT BEFORE THE HEARING?

If you have filed a request for due process, you may also request a Voluntary Settlement Conference to assist you in resolving your special education dispute. OAH is committed to assisting parties in resolving as many cases and as early in the process as possible and will provide an ALJ for a Voluntary Settlement Conference if requested.

WHAT IS A VOLUNTARY SETTLEMENT CONFERENCE?

A Voluntary Settlement Conference is a meeting between an ALJ, you, your attorney if you have one, and the other party or parties and their attorney(s), during which the ALJ assists the parties in attempting to settle their case. Typically, you would request a Voluntary Settlement Conference before a due process hearing and only after you have participated in mediation and were unable to reach a settlement agreement.

HOW DOES A VOLUNTARY SETTLEMENT CONFERENCE DIFFER FROM MEDIATION?

A Voluntary Settlement Conference is more formal than mediation, and the ALJ assigned may be more “evaluative” than a mediator would be at mediation. In other words, the ALJ may tell the attorneys and parties how he or she might rule on certain issues, based on the facts. The ALJ may structure the Voluntary Settlement Conference to meet the needs of the particular dispute. For example, you may be in the same room as the other party or parties during, or you may be in separate rooms.

HOW DO I REQUEST A VOLUNTARY SETTLEMENT CONFERENCE?

Your request may be in the form of a letter sent to OAH by mail or by facsimile transmission to 916-376-6319. Before preparing your request, you should contact the other party or parties, and ask them if they are willing to participate in a Voluntary Settlement Conference.

The request should contain pertinent information about the case such as the case name and number, should state that you want to participate in a Voluntary Settlement Conference to try to settle the case, and should propose dates you and the other party or parties are available to participate in a Voluntary Settlement Conference. You must send a copy of your request to the other party or parties in the due process proceeding (hand delivery, mail or fax), or to their attorneys if they are represented, at the same time you send it to OAH.

If your request is granted, OAH will set the date and time for the Voluntary Settlement Conference and will provide written notice of the date, time, and place to you and the other parties. **(FORM 7)**

WHERE IS THE SETTLEMENT CONFERENCE HELD?

The Voluntary Settlement Conference will be held at the offices of OAH, unless otherwise ordered. Each party or representative who attends is required to be fully familiar with the facts and issues in the case, and is required to have the authority, or to be able to obtain authority immediately by telephone, to negotiate settlement terms.

WHAT ARE SETTLEMENT CONFERENCE STATEMENTS?

You may be required to file a Confidential Settlement Conference Statement at least three (3) business days prior to the Voluntary Settlement Conference. Your Confidential Settlement Conference Statement should describe the factual and legal issues and the status of any previous settlement discussions in the case.

WHAT SHOULD I BRING TO THE SETTLEMENT CONFERENCE?

You should bring any pertinent documents and a draft of any settlement proposal on disk or in writing.

IS THE SETTLEMENT CONFERENCE CONFIDENTIAL?

The Settlement Conference Statement, other settlement materials, and settlement discussion are deemed confidential unless you and the other party or parties agree otherwise.

WHAT HAPPENS AT THE CONCLUSION OF THE SETTLEMENT CONFERENCE?

If you reach a settlement at the Voluntary Settlement Conference, the settlement is required to be written in a settlement agreement and the case will be dismissed..

Sometimes school districts must get approval of any settlement of cases from the superintendent of the school district or school board. The settlement will become final when they receive final approval. If no agreement is reached, the ALJ will confirm the hearing dates with the parties and the matter will proceed to hearing.

CHAPTER 5 - THE PREHEARING CONFERENCE

WHAT IS A PREHEARING CONFERENCE?

A Prehearing Conference is a telephonic conference held between the ALJ, you, and the other party or parties for the purpose of discussing and planning for the due process hearing. You will discuss things such as names of witnesses who will testify at the hearing and for how long, how your exhibits (documentary evidence) are to be marked for the hearing, and your estimate of the amount of time necessary to complete the hearing. The Prehearing Conference enables you, the other party or parties, and the ALJ to be prepared for, and to know what to expect during, the due process hearing.

HOW WILL I KNOW WHEN THE PREHEARING CONFERENCE IS TO BE HELD?

You may get a date for a Prehearing Conference in one of two ways:

- Your mediator will set the date for the Prehearing Conference at the conclusion of the mediation in your case if the case does not settle in mediation.
- You may file a request with OAH for a Prehearing Conference. You should contact the other party/parties before requesting and select a date you are all available.

WHAT HAPPENS IF I DON'T REQUEST A PREHEARING CONFERENCE?

If neither you nor the other party requests a Prehearing Conference, you will proceed directly to your scheduled Due Process Hearing. However, you will still be bound by the laws requiring you to serve your exhibits and witness list on the other party. The law requires that within five (5) business days before the due process hearing, you must send to the district, and any other parties, copies of all documents (exhibits) you intend to use as well as a list of witnesses you intend to call to give oral testimony at due process hearing (see further discussion below in the section titled The Prehearing Conference).

Requesting a Prehearing Conference will give you and the other parties the opportunity to talk to the ALJ prior to the hearing, and to ensure that you have done what you need to do prior to the hearing.

WHEN WILL THE PREHEARING CONFERENCE BE HELD?

The Prehearing Conference is held approximately five to ten business days prior to the due process hearing.

DO I NEED TO ATTEND THE PREHEARING CONFERENCE?

If you are representing yourself at the Due Process Hearing, you are required to attend the Prehearing Conference. If you have an attorney, the attorney may attend on your behalf. All Prehearing Conferences are held telephonically, unless otherwise ordered.

WHO WILL PRESIDE OVER THE PREHEARING CONFERENCE?

Typically, the ALJ assigned to preside at your due process hearing will also preside over the Prehearing Conference. The ALJ will initiate the Prehearing Conference by calling you or your attorney and the other party on the date and time specified in the notice.

You may go to OAH's Web site to find out which ALJ is assigned to your case and view the OAH calendar. www.oah.dgs.ca.gov.

WILL THE PREHEARING CONFERENCE BE RECORDED?

Generally, Prehearing Conferences are not recorded, although the ALJ has the discretion to elect to record the Prehearing Conference.

DO I NEED TO PREPARE FOR THE PREHEARING CONFERENCE?

Three (3) business days prior to the Prehearing Conference, you or your attorney are required to file with OAH, and send to the opposing parties, or their attorneys, a Prehearing Conference Statement. **(FORM 9)**. The other party is required to file a Prehearing Conference Statement and to serve a copy to you as well. This Prehearing Conference Statement is required to include the following:

- Your estimate of the number of days necessary to complete the due process hearing
- A concise statement of the issues to be decided at the due process hearing, and the proposed resolution of each issue, based only on those issues raised in the due process hearing Request. You may not raise any new issues in your Prehearing Conference Statement.
- The name of each witness you may call at the due process hearing, a brief summary of the subject of the expected testimony of the witness, and a description of the issue to which the testimony of the witness relates.
- The name of each expert you may call at the due process hearing, a brief summary of the expert's subject of expected testimony, and a description of the issue to which the expert's testimony relates.

- A list of the exhibits that you intend to present at the due process hearing, and a description of any physical or demonstrative evidence. Exhibits are typically documentary evidence, such as your child's IEP, that you want to rely on during the hearing to prove your case.
- The names of any witnesses, if any, you would like to have testify telephonically at the due process hearing.
- The need, if any, for an interpreter or special accommodation at the due process hearing.

WHAT IS DISCUSSED AT THE PREHEARING CONFERENCE?

During the Prehearing Conference, you or your attorney should be prepared to discuss all matters necessary to enable the ALJ to make orders that will make the hearing proceed smoothly and in an organized manner. The matters that will be discussed include the following:

Location and Time: The Due Process Hearing date, time, and location.

Issues: The issues to be heard at the due process hearing and decided by the ALJ in a written decision. During the Prehearing Conference, the ALJ and the other parties will be given the opportunity to ask questions to clarify the issues. For example, clarifying which school years your issue involves.

The proposed resolutions. During the Prehearing Conference, the ALJ and parties will be given the opportunity to ask questions to clarify the requested outcome the parties are seeking. For example, clarifying the remedies you are seeking in the due process hearing.

Exhibits: The ALJ will discuss with you the requirements for numbering your exhibits, the number of copies you will need to take to the hearing, and when you will need to provide your exhibits to the other party. Unless otherwise ordered by the ALJ, you must provide your exhibits, properly numbered in a binder, to the other party five (5) business days prior to the due process hearing. The exhibit binder for the ALJ should not be sent to OAH, but should be brought with you to the hearing on the first day.

Witnesses: During the Prehearing Conference, you will be expected to discuss matters relating to the witnesses you intend to call at hearing. You are responsible for getting your witnesses to attend the due process hearing. The school district may, if you request it, often make available at the hearing any witnesses you intend to call who are employed by the school district.

Telephonic testimony: During the Prehearing Conference, you should be prepared to discuss whether any witnesses you wish to be allowed to testify by telephone at the due process hearing. If the other party objects to telephonic testimony, you will be expected to explain

the reasons why this witness cannot testify in person. The ALJ will rule, at the Prehearing Conference, on whether the witness will be permitted to testify telephonically. If the ALJ authorizes telephonic testimony, you will be required to provide, prior to your witness's testimony, a copy of all exhibits, in exhibit binders, to the witness who will testify telephonically. This will enable the other parties to cross-examine that witness and will also enable the ALJ to question that witness as necessary.

Witness Time Estimates: During the Prehearing Conference, you will be expected to provide estimates of the time you will need to question each of your witnesses.

Prehearing motions. During the Prehearing Conference, you will be expected to discuss any motions you intend to file prior to the due process hearing. Prehearing motions might include, for example, a motion to change the location of the hearing.

Public or private hearing: Whether the hearing will be open to the public. Special education hearings are not open to the public unless the parent requests that the hearing be open for any member of the public to attend.

WHAT IS A PREHEARING CONFERENCE ORDER?

After the hearing, the ALJ will issue a Prehearing Conference Order and will send a copy to you. That order will include an outline of the matters discussed at the Prehearing Conference and any orders (directions) that must be followed. **(FORM 10)**.

You are required to comply with the orders that are contained in your Prehearing Conference Order. If you do not comply with the orders, the ALJ may impose sanctions (penalties) against you. For example, if you do not provide your exhibits to the other parties five (5) business days prior to the due process hearing, the ALJ may not allow you to introduce your exhibits during the due process hearing.

CAN I REQUEST MEDIATION AT THE PREHEARING CONFERENCE?

It is important to keep in mind that you may request a mediation, or another mediation if you have already had one, at any time in the proceeding, including during the Prehearing Conference. You may request mediation during the Prehearing Conference by asking the ALJ to schedule one. Mediation is voluntary, so the ALJ will ask the other party or parties if they are willing to mediate. If the other party or parties agree to mediate, the ALJ will schedule mediation for you, to occur prior to the dates scheduled for the due process hearing.

WHAT ARE MY OPTIONS IF I CANNOT GET MY PREHEARING CONFERENCE STATEMENT PREPARED AND SERVED THREE BUSINESS DAYS PRIOR TO THE PREHEARING CONFERENCE, OR IF I CANNOT ATTEND THE PREHEARING CONFERENCE?

If you cannot be prepared to proceed with the Prehearing Conference, you may request an extension of the time to file your Prehearing Conference Statement and/or to continue the actual Prehearing Conference. This must be in letter form and served on all other parties at the time you file the letter with OAH. This document can be hand-delivered, mailed or faxed to 916-376-6319. A sample Request for Continuance of the Prehearing Conference is attached. **(FORM 11)**.

CHAPTER 6 – PREPARING FOR DUE PROCESS HEARING AND OTHER THINGS YOU NEED TO KNOW BEFORE THE DUE PROCESS HEARING

WHAT ARE EXHIBITS?

Exhibits are the Documents you intend to use at the due process hearing. No later than five (5) business days before the hearing you must give the district and any other party a copy of your documents. (Saturdays, Sundays, and state and federal holidays do not count as business days for this purpose.) This is commonly referred to as an Exhibit Book. The district and any other party must also give you a copy of their Exhibit Book by this time as well.

When you are preparing your exhibit book, make sure that all of your exhibits are complete and in the correct page order. For example, do not include as an exhibit only one page of an IEP or other document. You should include the entire IEP or document, not just one or two pages of it. When you receive the District's exhibit book, you will want to look through it carefully to make sure that the District has included all pages of the IEPs and other documents. You will also want to read the documents. Make notes about the documents that you want to object to at the hearing, or that contain some information that you may want to ask a witness about at the hearing.

CAN I REVIEW MY CHILD'S SCHOOL RECORDS?

You have a right to inspect and review all education records relating to your child that the school or the District collects, maintains, or uses regarding the identification, evaluation, and educational placement of your child and the provision of a free appropriate public education (FAPE) to your child.

HOW DO I REQUEST THOSE SCHOOL RECORDS?

The law provides that your request for these records may be made orally or in writing. However, it is always best to make your request in writing, and keep a copy of your letter to the school or to the District for yourself, so that you have evidence that you made the request and when it was made. The District must respond to the request without unnecessary delay before the due process hearing, but no later than five (5) business days after you request them. (Saturdays, Sundays, and state and federal holidays do not count as business days for this purpose.) You also have the right to receive a response to your reasonable requests for explanations and interpretations of the records. You may ask the District to provide you with a copy of your child's records, and the District may charge you a reasonable fee for making the copies. The District cannot charge you for searching for and retrieving the records. Also, the fee for making the copies cannot be in such an amount that it would effectively prevent you from inspecting and reviewing the records.

WHAT IF THE SCHOOL DISTRICT DOES NOT GIVE ME THE RECORDS?

If the school district is not giving you the records, you can file a compliance complaint with CDE.

HOW DO I OBTAIN NON-SCHOOL RELATED DOCUMENTS?

There are special requirements to obtain medical records or employment records about someone other than your child. In the unlikely event that you need to obtain medical records of a person other than your child, you need to be aware of the requirements of California Code of Civil Procedure section 1985.3, which requires notice to the person whose records you are seeking. In particular, Code of Civil Procedure section 1985.3 requires that you serve a copy of the subpoena on the person whose records you are seeking at their last known address at least 10 days prior to the date you want to get the documents and five days prior to the date that you serve the subpoena on the person or company that is holding the documents (for example, a doctor's office). Failure to give the required notice may make the subpoena unenforceable.

WHAT DO I NEED TO KNOW ABOUT WITNESSES I WANT TO HAVE TESTIFY AT THE DUE PROCESS HEARING?

You must exchange witness lists with the school district five (5) business days prior to the hearing. (Again, Saturdays, Sundays, and state and federal holidays do not count as business days for this purpose.) If you do not do so, the ALJ may exclude (prevent) your witnesses from the hearing.

In the days before the hearing, think about the facts you want the hearing ALJ to know, and what witnesses you will need to testify about those facts.

Think about what you want to ask the witnesses. It is a good idea to write out the questions you want to ask the witness in advance, so that you don't forget anything.

You should also consider the order in which you want the witnesses to testify. However, keep in mind that sometimes witnesses cannot be scheduled to testify in the order you would prefer. Often witnesses testify "out of order."

Scheduling witnesses is not always easy, because sometimes it is hard to predict how long a witness will testify, but do your best to have witnesses lined up throughout the hearing day so that there are not long periods of time when the parties and the ALJ at hearing are waiting around for a witness to appear. When you are scheduling witnesses remember that, if you filed the due process complaint, then you will be presenting your case first at the hearing, so you must have witnesses available on the first day of hearing.

Let your witnesses know what day and time you want the witness to be present at the hearing, and let them know where the hearing will take place. It is best to do this by writing them an e-mail or a letter. You can also use a subpoena to obtain the presence of a witness at the hearing.

HOW TO I GET A WITNESS TO APPEAR IF THEY DO NOT AGREE TO APPEAR?

Unwilling Witnesses: However, sometimes people who are not school district employees do not want to testify. This section describes what to do to get documents that are not part of your child's school record and how to get people to testify at hearing who do not want to attend voluntarily.

Subpoenas for Unwilling Witnesses: To compel people to provide documents or testimony, you can use a subpoena (**FORM 16**). A subpoena is a legal document that compels production of documents or attendance at a hearing. Although OAH itself cannot hold people in contempt, a subpoena is enforceable by seeking a contempt order from the Superior Court in your county.

Attorneys can sign subpoenas themselves. However, if you are not an attorney, you can obtain subpoenas from OAH prior to hearing by requesting them via telephone from the OAH support staff person that is assigned to your case. Call 916-263-0880 and ask to speak to the staff person assigned to your case.

The subpoena form will be signed by the Presiding ALJ for OAH. However, it will be up to you to fill in the subpoena to include the details. Subpoenas for documents must identify who you are seeking documents from and the documents that you are seeking. Subpoenas for people to testify must name the person and the time, date and place of the hearing. After the hearing has begun, you may also be able to obtain a subpoena by having the ALJ who is conducting your hearing sign the subpoena for you.

Proper Service of a Subpoena is Required: To be enforceable, subpoenas must be properly served. Proper service means that you can show that it actually got to the person or place who was supposed to receive it. In general, personal service is required for a subpoena that requires someone to testify. (See Code Civ. Proc., § 1987.) Personal service means handing the subpoena to the person. Personal service is important because unless the person had actual notice of the hearing, it is difficult to compel them to attend. Also, witnesses compelled to attend the hearing by subpoena must be paid witness fees and mileage.

Remember, it is easier to try to work with other people's schedules so that they can attend the hearing voluntarily. Thus, if a witness is unavailable on the date or time that you want them to testify, see if you can find, in consultation with the ALJ conducting your hearing, another time where the witness can testify voluntarily. (See Code Civ. Proc., §§ 1985.1 & 1985.2.) For documents, you may be able to serve the subpoena by mail, provided that you add five

days to the service time, or by facsimile if the party you are serving the documents on agrees in writing. (See Code Civ. Proc., § 1013.)

WILL THERE BE AN INTERPRETER FOR THE HEARING?

The hearings are conducted in English. If you, or any of your witnesses, do not speak English well or at all, you can request that an interpreter be present at the hearing.

The due process complaint form contains a space to mark that you need an interpreter and the language that the interpreter should speak. If the District filed the due process complaint against you, you should call or write to OAH/Special Education Division to request an interpreter when you received the due process complaint.

If, however, you have not yet made OAH aware of your need for an interpreter, call OAH/Special Education Division in Sacramento immediately and let the staff know that you require an interpreter for the due process hearing. It is the responsibility of OAH to arrange for the interpreter, but OAH staff needs to know before the date of the hearing that you need an interpreter.

WHAT IF I WANT TO USE AN EXPERT WITNESS?

Don't be surprised if doctors, psychologists, or other professionals ask to be paid to appear and render expert opinions. This is common, particularly when these people make money by seeing patients or providing service and any time away from that reduces their income. A subpoena cannot be used to compel someone to provide professional opinions at no cost, but is limited to compelling testimony about what the person saw. Expert witness fees are not recoverable meaning that even if you win the case, you can not recover expert witness fees from the district or any other party.

If you think you need testimony from a professional like a psychologist or someone who assessed your child, you should contact them as early as possible and determine if they would be willing to come to the hearing and testify without cost. If you cannot pay for their testimony, it may be possible to subpoena the person to provide limited testimony about his or her observations.

Another alternative is to see if you can minimize the disruption to the professional's schedule by taking telephonic testimony, which is generally shorter and can be fit in to the person's schedule. If you think you need to take testimony by telephone, you should ask the ALJ at the beginning of the hearing or the ALJ who conducts your Prehearing Conference if he or she will allow telephonic testimony from your witness. Be sure to explain that you are asking because it is difficult to get the professional to appear.

WHAT IF I NEED TO CONTINUE THE INITIAL DATES SET FOR DUE PROCESS HEARING?

OAH assigns an initial hearing date when the case is filed, and sends a Scheduling Order to the parties advising them of this date. The Scheduling Order comes with a form, which you and the school district and any other parties may fill out and send to OAH to jointly request a continuance of the initial hearing date. All parties must agree to the new dates and sign the form. Read and follow the instructions on the form before you and the school district fill it out and send it to OAH. OAH will grant continuances when a complete form is submitted. Please read the instructions for the form carefully and follow all directions. Failure to submit a complete form may result in denial of your request. **(FORM 12).**

WHAT IF I NEED AN ADDITIONAL CONTINUANCE?

If you need another continuance of the hearing, contact the District and any other parties and see if they will agree to a continuance. If all other parties agree, you can jointly request a continuance from OAH. OAH will review the request and will only grant this additional request based on “good cause” for the continuance. That means that the reasons why you want the continuance must be good reasons. The request will be ruled on by an ALJ. Until the ALJ has made a ruling on the request for continuance, you and the District and all other parties must be prepared to go to hearing on the date set because the continuance may be denied if good cause has not been established. **(FORM 13) You may not use the forms provided with your scheduling order for a second continuance.**

If the District or any other party will not agree to a continuance, you should send your request for a continuance to OAH, and serve it on the District and to all other parties. Your request must explain why there is “good cause” for the continuance. Again, until the ALJ has made a ruling on the request for continuance, you must be prepared to go to hearing on the date set. **(FORM 14)**

ARE THERE OTHER IMPORTANT THINGS I SHOULD KNOW BEFORE THE DUE PROCESS HEARING?

You should bring pens and plenty of paper to the hearing, so that you can take notes. It may also be helpful for you to bring sticky notes (post it). You should also bring the following: (1) the exhibit notebook that the District sent to you; and (2) three copies of the exhibit notebook that you sent to the District, so that there is one for the ALJ, one for the witnesses to use, and one for you to use.

You have the right to be represented by an attorney at the hearing at your own expense. No attorney will be appointed for you. There is a list of attorneys on the OAH website www.oah.dgs.ca.gov who have agreed to represent parents at a lower fee, or for free.

You are not required to have an attorney at the hearing. Some parents hire an advocate to represent them at the hearing. Some parents choose to represent themselves at the hearing.

Be aware that usually, but not always, Districts are represented by attorneys at the hearing. Any party who is going to be represented by an attorney at the hearing must notify all other parties to the hearing of that fact at least ten (10) calendar days before the hearing date.

WHERE IS THE DUE PROCESS HEARING HELD?

The due process hearings generally take place at the District's offices, but, on occasion, it may take place at one of the OAH hearing offices. Parents can also request that the hearing be held at a location other than the district's offices.

IN WHAT KIND OF ROOM WILL THE HEARING BE HELD?

The Due Process hearing may be held in a conference room at the District, or in the "Board Room" where the school board holds its meetings. When you arrive at the District's offices, the receptionist will help you find where the hearing will take place.

If possible, the ALJ will have the room set up to look like a courtroom, with the witness chair to the side of the ALJ, and the parents and the District representatives sitting in front of the ALJ. Sometimes the room is not of the correct size or the furniture is shaped or sized in such a way that the room cannot be set up like a courtroom. The ALJ will set up the room as he or she thinks is best.

WHEN SHOULD I ARRIVE AT THE HEARING?

The time and location of the hearing is contained in the Scheduling Order. It is a good idea to get to the hearing early, so that you can find the hearing room and have time to get organized before the hearing starts.

WHAT SHOULD I DO IF I AM RUNNING LATE TO THE HEARING?

If you are going to be late, you should call OAH's office in Sacramento and tell the staff there that you will be late. The OAH staff in Sacramento will know how to contact the ALJ and let the ALJ know that you will be late.

If you are late to the hearing, and you have not called, your due process complaint may be dismissed. If the District filed a due process complaint against you, then the ALJ can hear the District's side of the case even though you are not present. Therefore, it is important to appear, in person and on time at the hearing.

WILL THE HEARING BE RECORDED?

All due process hearings are recorded using digital equipment, which is connected to the ALJ's laptop computer. There are four microphones: one for the witness, one for the ALJ, one for the parents' side of the table, and one for the District's side of the table.

WHO IS RESPONSIBLE FOR THE RECORDING EQUIPMENT?

Before the start of the hearing, the ALJ will set up the recording equipment in the hearing room. To ensure the equipment is set up properly, the ALJ may ask that the parties leave the room to avoid any distractions. Throughout the hearing, the ALJ will check the sound and make sure that the hearing is being recorded correctly.

The ALJ will turn the recording equipment off during breaks at the hearing, and, will announce when he or she has turned the recording equipment on or off. When the recording equipment is turned on, that is called “going on the record.” When the recording equipment is turned off, that is called “going off the record.”

The ALJ will invite you and the District personnel back into the hearing room when the ALJ has finished setting up the recording equipment and is ready to start the hearing. The ALJ may direct you and the District representative where to sit. If the room is set up like a courtroom, it is customary for the person who filed the due process complaint to sit on the side closest to the witness chair.

WHAT SHALL I DO JUST BEFORE THE HEARING BEGINS?

Before the hearing starts, you will give one of your exhibit notebooks to the ALJ and put another of your exhibit notebooks by the witness chair. Similarly, the District representative will give one of the District’s exhibit notebooks to the ALJ and put the District’s other exhibit notebook by the witness chair.

WHERE WILL MY WITNESSES BE?

If your witnesses for the first day of hearing are present at the hearing room, you should ask them to wait outside the hearing room until they are called to testify. Except for the parties, witnesses are usually not allowed to sit in the hearing room and hear the testimony of other witnesses.

ARE CELL PHONES PERMITTED?

The ALJ will expect that you and everybody in the hearing room have turned off their cell phones and PDAs before the hearing starts. You should also remind your witnesses to turn off their cell phones and PDAs before they come into the hearing room to testify.

WILL THE ALJ BE WEARING A BLACK ROBE?

Some ALJs wear a judicial robe during the hearing; some do not. Whether the ALJ wears a robe depends on many factors. Whether or not the ALJ is wearing a robe, the ALJ is still an ALJ, and he or she is fully authorized to conduct the hearing. All ALJs at special education due process hearings are licensed California attorneys who have received training in the area of special education and in the conduct of administrative hearings.

AFTER THE PARTIES ARE SEATED WHAT WILL HAPPEN FIRST?

When the parties are seated in the hearing room, but before the ALJ turns on the recording equipment, the ALJs may ask whether there is anything that anyone wants to discuss. This can be a good time to mention things that might affect the progress of the hearing, such as scheduling of witnesses, or if you did not receive some or all of the school district's exhibits. Sometimes things come up after the prehearing conference that you think that the ALJ should know, and this is an opportunity to mention them to the ALJ. Sometimes, if the parties are close to settling the matter, they will use this time to ask the ALJ whether the ALJ will give them some additional time to discuss settlement before the hearing starts. It is up to the ALJ to decide whether to grant such a request.

CHAPTER 7 – THE DUE PROCESS HEARING

HOW WILL I KNOW WHEN THE DUE PROCESS HEARING OFFICIALLY BEGINS AND IT IS BEING RECORDED?

Before the ALJ turns on the recording equipment, the ALJ will usually say something like, “We are going on the record now.” The hearing does not officially start until the ALJ has turned on the recording equipment. When the recording equipment has been turned on, the ALJ will announce the name and number of the case, identify himself or herself, and state the date and time. This is called “opening the record.”

“PARTY APPEARANCES FOR THE RECORD” AND THE “OATH”?

The ALJ will also ask the parties to make their “appearances,” which means to introduce themselves. If your name is “John Doe,” and you are the parent, you will say, “I am John Doe, and I am the father of Jane Doe, the Student in this case. My name is spelled J-O-H-N D-O-E.” Each person then takes turns stating their full name and spelling their name and stating whom they represent.

If there is an interpreter, he or she must also, at this time, state and spell his or her name, and identify himself as an interpreter. Then, the ALJ will “swear in” the interpreter by having the interpreter stand, raise his or her right hand, and swear (or affirm) to properly interpret the proceedings.

If you are representing yourself at the hearing, some ALJs may also, ask you to rise, raise your right hand, and take the witness oath by which you swear (or affirm) to tell the truth. This is done so that there will not be any concern about whether what you say during the hearing is argument or evidence. The ALJ will let you know when the ALJ wants to “swear you in.”

OTHER PROCEDURAL ISSUES

After everybody has made their appearances, the ALJ may often discuss certain matters that the ALJ believes should be mentioned while “on the record.” These matters vary depending upon the case, but they may include motions or evidentiary issues that have arisen since the prehearing conference, or scheduling matters. The ALJ may mention certain of his or her practices and preferences regarding the hearing, such as when the lunch break or other breaks will be taken. If you are representing yourself, the ALJ will describe the hearing process for you, and perhaps give you more details than you will find in this Manual.

During any of these discussions, and during any part of the proceedings, only one person speaks at a time. Nobody should interrupt anybody else, and nobody should interrupt the ALJ. If you have something to say, you must wait until it is your turn to say it. If you are

afraid you will forget what you want to say, write it down, and wait until it is your turn to speak.

WHAT ARE OPENING STATEMENTS?

The party who filed the due process complaint presents his or her case first, so the ALJ will start with that party. The party who did not file the due process complaint presents his or her case.

The ALJ will ask each party, in turn, whether the party wishes to make an opening statement. You are not required to make an opening statement. Also, if you are the Respondent, which means that the district has filed a case against you, you can give your opening statement now, at the beginning of the hearing, or you can “reserve” your opening statement, which means you will wait to give it until it is time for you to present your case.

The opening statement should tell the ALJ what the case is about, and what your evidence will show. A good opening statement is like a “road map” of the case. It should tell the judge, in a sentence or two, what the case is about.

For example, “This case is about my daughter, Jane, who has autism. I disagree with the speech and language and occupational therapy assessments performed by the District. I want Jane to have independent speech and language and occupational therapy assessments. Also, Jane receives group speech and language and occupational therapy services now, but she is also entitled to receive clinic speech and language services and clinic occupational therapy services.”

You will then say who the witnesses are and what they will say, or what the documents prove.

For example, you could say, “I intend to call Mary Smith at the hearing. Mary Smith was my daughter Jane’s second-grade teacher. She attended the IEP meeting on January 22, 2007, where the IEP team discussed the speech and language and occupational therapy assessments. I expect her to testify that Jane needs clinic-based speech and language services.”

You would then say something similar for each of your witnesses. You don’t have to say very much about each witness. It is enough if you state just a sentence or two about who they are and what you expect them to say at hearing. Then, the ALJ will know what to expect as the hearing progresses, and can begin to think about the case from your point of view.

WHAT IS THE ORDER OF WITNESS TESTIMONY?

After opening statements have been given, the ALJ will ask the party who is presenting the case first, to call his or her first witness. That party will go out of the hearing room and bring

the witness in. The witness will stand by the witness chair. The ALJ will give the witness the oath, and then ask the witness to sit down. The ALJ will ask the witness to state and spell his or her name for the record. After that, the ALJ may explain to the witness a few things about the hearing process and the fact that the hearing is being recorded.

The party who has called the witness asks the questions first. This is called “direct examination.”

When the first party has asked all of the questions it wants to, the ALJ will give the other party the opportunity to ask questions. This is called “cross-examination.”

After the other party has finished the cross-examination, the first party may ask additional questions. This is called “re-direct” examination.

Then, the second party may wish to ask more cross-examination, and that is called “re-cross examination.”

The questioning goes on like that until both parties have finished asking questions.

Then, the ALJ may have some questions for the witness. After the ALJ has finished asking questions, the ALJ will ask the parties if they have any further questions, based upon what the ALJ has asked. If so, the party who went first will go first again.

After the parties and the ALJ have finished with their questions, the ALJ will ask whether the witness may be excused. If the parties say “yes,” then the ALJ will tell the witness that he or she can leave.

The rest of the hearing proceeds, until all witnesses are called. When the party who filed the complaint has finished calling all of its witnesses, that party “rests.”

Then it is the other party’s turn. If they have “reserved” opening statement, they will begin with the opening statement, and then call witnesses for questioning. The questioning will proceed in the same manner as described above.

WILL I HAVE TO TESTIFY?

You may call yourself as a witness, or the District may call you as a witness. You will then go to the witness chair. The ALJ will “swear you in,” (if you have not already been “sworn in”). If you have called yourself as a witness, you do not ask yourself questions. You just tell the ALJ the facts that you know about the case. The ALJ may ask you some questions while you are testifying, and may even ask you some questions at the beginning of your testimony, to get you started. If the District has called you as a witness, the attorney for the District will ask you questions first.

WHAT DO I DO IF I DISAGREE WITH A QUESTION BEING ASKED BY ANOTHER?

Whenever a witness is testifying, it is important to listen carefully to the questions that the other party is asking a witness, because you have the right to object to a question that is asked.

The objection is properly made before the witness starts to answer the question. You may also object to a document when a witness is asked about it.

To make any type of objection, you say, “Objection,” and briefly tell the ALJ the reason for the objection.

The ALJ may ask to hear arguments from the other party and from you about the objection, or may simply make a ruling on the objection without hearing arguments.

If the ALJ says “overruled,” then the ALJ has denied your objection, and the ALJ will instruct the witness to answer the question, or will permit the witness to testify about the document.

If the ALJ says “sustained,” then the ALJ has granted your objection, and the witness will be instructed not to answer the question or not to testify about the document.

If you are asking a question and the other party makes an objection, the ALJ will let you know if he or she wants to hear argument from you about the objection. Many times, parties will start arguing about the objections before the ALJ has asked for argument. This is not a good idea. Wait until the ALJ asks for argument on an objection before you start arguing.

If you are the witness, you have the right to object to the District’s questions and to the documents that the attorney for the District may show you.

Sometimes, you or another party will ask a witness a question, and the witness will not only answer the question, but will say additional things that do not respond to the question. If you do not want the ALJ to consider that additional information, you can try to have it “stricken” (that is, removed) from the record.

For example, if the witness answered “yes,” and then added something after the “yes,” that you thought did not really answer the question that was asked, you would say, “Move to strike everything after yes.” The ALJ will then decide whether your motion to strike will be granted or denied. As with objections, do not argue about the motion to strike unless the ALJ asks for argument.

If a witness is shown a document during the questioning, the ALJ will mark the document for identification so that during the hearing when a witness is asked about a document, everyone will know what document is being discussed. At some point during the hearing, the party

who wants to have the document entered into evidence will ask (“move”) that the document be admitted into evidence. Some ALJs may ask that you “move” the document into evidence after you have shown it to the witness and the witness has testified about it. Some ALJ will prefer that you “move” any such documents into evidence after the witness has finished testifying, but before the witness leaves the witness chair. Other ALJs may ask that the document be “moved” into evidence at the end of each day of hearing. The ALJ will let you know what he or she prefers.

When the ALJ “moves” the documents into evidence, the ALJ will ask whether there are any objections to having the document moved into evidence. If you have an objection to the opposing party’s documents, now is the time to make them. The ALJ will rule on your objections. The other party may also make objections to the documents you “move” into evidence. The ALJ will also rule on those objections. As before, the ALJ will let the parties know whether the ALJ wants you to argue over the objections.

IS TELEPHONIC TESTIMONY PERMISSIBLE?

Sometimes a witness cannot be present at the hearing. They may be ill, or out-of-town, or they are otherwise unavailable to testify in person at the hearing. Under those circumstances, you can make an oral motion to the ALJ to have the person testify at the hearing over the telephone. Sometimes there is an emergency, however, and the unavailability of the witness is only known when the hearing starts.

You must receive the permission of the ALJ to have a witness testify by telephone. If the ALJ grants permission for a witness to testify by telephone, you must make sure that the witness testifies on a land-line phone, not on a cell phone. The witness must be alone in the room when he or she is testifying, and the witness must have the exhibit books of all parties in front of him or her when she is testifying. This means that you will have to make copies of all of the exhibit books, and any additional exhibits that have been presented, and send them to the witness before the witness scheduled to testify so that the witness will have them in time for their testimony.

WHAT IS THE LENGTH OF THE HEARING DAY AND WHAT ABOUT BREAKS AND LUNCH?

On the first day of hearing, the hearing customarily starts at 9:30 a.m. After the first day of hearing, the time that the hearing begins each day is usually 9:00 a.m., but the ALJ may change the time the hearing starts, depending upon when the witnesses are scheduled. The hearing day usually ends in the late afternoon, at approximately 4:30 p.m. or 5:00 p.m. Again, depending upon when witnesses are scheduled, and how long a particular witness testifies, the hearing day may end a little earlier or a little later. In general, a good rule-of-thumb is to have approximately 6 hours of testimony a day, not including breaks and lunch.

Each hearing day, it is customary to have a brief break in the morning and in the afternoon, as well as a lunch break. Each ALJ varies as to when these breaks occur, and how long they

last. When it is time to take a break or go to lunch, the ALJ will go “off the record,” and turn off the recording equipment. After the break, or after lunch, when the parties have returned to the hearing room, the ALJ will go “back on the record.” The ALJ will then turn on the recording equipment, and will announce the date, the time, and identify the parties who are present. Then, the hearing will proceed where it left off.

At the end of the hearing day, the parties will decide where the exhibit books for the witnesses will be stored. Often, there is a reasonably secure place in the District’s office where the witness’ exhibit books can be stored, so that the parties do not have to carry them to and from the hearing. You will want to take your copies of your exhibit books home with you at the end of the hearing day, as well as your notes, so that you can prepare for the next day’s hearing.

At the end of each hearing day, the ALJ will ask what witnesses are expected to testify the next day, and when they are expected to testify.

WHAT SHOULD I DO AT THE END OF A HEARING DAY?

After the hearing day ends, you may have to call the witnesses you have scheduled for the next day to update them on what time to appear for hearing the next day. If you have time, look over the notes you took at the hearing. Think about the questions you want to ask the witnesses for the next day, and the exhibits you want to present. Make notes about matters that you will want to include in your closing argument. You may even want to start writing out your closing argument, and add to it at the end of every hearing day, so that you will be ready to read it to the ALJ at the end of the hearing.

HOW IS THE HEARING CONCLUDED?

After both parties have rested, they have the opportunity to offer “rebuttal.” Rebuttal is evidence to explain or disprove facts that the opposing party has put into evidence. Note that rebuttal is not simply repeating testimony and evidence that you have already given at the hearing. The ALJ will not let you repeat testimony that the ALJ has already heard. Rebuttal evidence is very specific evidence that has not been presented before in the hearing that contradicts evidence that was introduced. Be aware that there is often not enough time during the due process hearing for Petitioners to find rebuttal evidence, and, most of the time, the Petitioner does not offer any “rebuttal” evidence.

After rebuttal, the ALJ will ask whether the parties wish to make oral closing arguments.

The ALJ will expect that, if you want to give a closing argument, you are ready to give a closing argument right then and there. As with opening statements, it is up to each party as to whether the party wants to give an oral closing argument.

If you want to make a closing argument you should summarize the evidence that has been presented, and tell the ALJ why the evidence shows that the he or she should rule in your favor.

You may also have an opportunity to submit a written closing argument, also called a “closing brief.” It is up to the ALJ as to whether he or she wishes to allow a closing brief. If the ALJ gives permission for you to file a closing brief, the ALJ will tell you the date that the brief is due and will announce the due date “on the record.” You must fax the closing brief to Sacramento (916-376-6319) for filing, and serve it on the other parties, by no later than the due date set by the ALJ. Remember that the closing brief should only discuss the evidence that has been presented at the hearing. You may not use the closing brief to attempt to have additional evidence admitted.

At some time after the last witness testifies, and before the hearing concludes, the ALJ may go over all of the exhibits that have been marked and/or admitted into evidence, to make sure that there are no exhibits missing.

When all of the above is completed, the hearing is concluded. The ALJ will go “off the record,” and turn off the recording equipment for the last time.

Before you leave the hearing room, be sure to take your exhibit books, including the exhibit book you prepared for the witness, with you. Before you leave, the ALJ may return to the parties all exhibits that were in their exhibit books, but that were not marked and/or admitted into evidence.

WHEN CAN I EXPECT A DECISION?

When you file a case, the law requires that the mediation and due process hearing take place, and the written decision be issued, within 45- days after the end of the 30-day resolution period. If the parties agree not to have a resolution session, then the law requires that the mediation, if any, and the due process hearing take place, and the written decision be issued, within 45 days after the due process complaint has been received or the date the parties waived the resolution session.

When the school district files a case, there is no resolution period. In that situation, the law requires that the mediation and due process hearing take place, and the written decision be issued, within 45 days after the due process hearing complaint has been received by the Respondent. The parties may agree to extend the 45-day period, or to waive it entirely. Any such agreement should be in writing. The 45-day period is extended whenever the due process hearing is continued. At the end of the hearing you may ask the ALJ the “due date” for your decision.

After the hearing is over, the ALJ will write a decision that will be faxed or sent to the parties. The decision will state the issues in the case, and the facts that the ALJ found to be true. Often the decision will discuss what witnesses the ALJ believed, and why. At the end

of the decision, the ALJ will state who won. This part of the decision is called the Order. Sometimes one party will have won the entire case. Sometimes, one party will win on some of the issues, and another party will win on other issues.

The Order will also state what the remedies are, if any. The law gives the ALJ much freedom to select the remedies. If you have won, the decision may not necessarily award you the remedy that you asked for.

WHAT IF I DON'T AGREE WITH THE DECISION?

If you do not agree with the decision, you can appeal the case. You have 90 days from the date you receive the decision to file an appeal. An appeal can be filed in federal court or in state court.

In order to appeal, the reviewing court requires a written transcript of the proceeding so you must request that OAH transcribe the digital recording of the hearing. **(FORM 15)** You, as parent, are entitled to one copy of the transcript in either written or electronic form at no cost to you. You are also entitled to one copy of the administrative record including copies of exhibits at no cost to you.

CHAPTER 8 – EVIDENCE AT THE DUE PROCESS HEARING

WHAT IS THE BURDEN OF PROOF?

The term “burden of proof” refers to which party to a dispute has to produce evidence. The term also can refer to how much evidence it will take to win.

As to which party has to produce evidence, the United States Supreme Court has ruled that unless there is an exception under state law, the burden of proof is on whoever filed for due process.

For example,

- If a parent files for due process on behalf of a child, then the parent has the burden of proof.
- If a school district files for due process, then the school district has the burden of proof.

The ALJ conducting your hearing will make a ruling based on whether the party who filed the due process hearing proved their case by a “preponderance of the evidence.” A “preponderance of the evidence” means that it is more likely than not that the party who filed is entitled to relief. Some people describe a “preponderance of the evidence” as 51% likely, or, if you imagine a scale, the scale tips slightly in one direction.

ARE THERE RULES ABOUT GETTING TESTIMONY AND DOCUMENTS ADMITTED AT HEARING?

By the time you attend the hearing you will already have gathered your documents (exhibits), put them in a binder for use at the hearing, and provided a copy of those documents to the school district and any other party. You will also have identified the witnesses that you intend to call at hearing and provided that information to the school district and any other party.

When you go to your due process hearing, the technical rules of evidence that lawyers use in court do not apply. However, the evidence that you produce still needs to be shown to be reliable and relevant (related to the hearing issues) in order to be admissible as evidence. For example, hearsay evidence, which means statements that were not under oath that are offered for the truth, is usually not admissible in court. However, in a due process hearing, the ALJ may consider hearsay evidence if there is evidence to corroborate it or show that it is reliable.

WHAT DO I HAVE TO SHOW TO HAVE THE DOCUMENT ADMITTED INTO EVIDENCE?

To have documents admitted as evidence, you must show that they are authentic, meaning drawn up at or around the time of the event being documented and that the document is unaltered. In other words, you have to show that the document is what you say it is and that it is an accurate copy. Documents can contain hearsay, such as statements by psychologists or assessors, or statements made in letters back and forth to a school district.

HOW DO I SHOW THAT THE DOCUMENT IS AUTHENTIC?

Documents can be authenticated by showing them to the person who wrote the document or participated in making it and then asking questions. Your questions should focus on establishing that the document is what it says it is and is an accurate copy.

The following questions are an example of how to authenticate a document with a witness who wrote it or participated in writing it:

- Q: Take a look at Exhibit __. Do you recognize it?
- Q: How do you recognize it? [if applicable]
- Q: Is that your signature on it?
- Q: Does Exhibit __ appear to be an accurate copy?

The above questions should work to establish the authenticity of most documents.

Documents can also be shown to be authentic because they were kept by a government agency or business in the regular course of business. For example, sometimes documents like attendance records are kept by a school office. To have a record like that admitted, the following questions should work:

- Q: Take a look at exhibit __. Do you recognize it?
- Q: How do you recognize it?
- Q: Was the information recorded by a person with knowledge?
- Q: Was the information recorded in the regular course of business?

The above questions are examples that can both establish whether the document is what you say it is and can also prove that the statements in the document are reliable.

In general, when you want to have testimony like the opinions of people that have assessed your child and prepared reports, it is preferable to have them appear at the hearing. That way, the person can both authenticate the report and more importantly, can testify about his or her conclusions.

HOW DO I GET TESTIMONY ADMITTED AT HEARING?

Testimony is oral evidence that is taken under oath. To provide testimony, each witness has to swear or affirm under penalty of perjury that he or she will tell the truth. The answers the witness gives to questions asked under oath is the evidence. The questions themselves are not evidence. In other words, questions asked at hearing only give context to the witnesses' answers.

Some witnesses are just regular people who saw the events relevant to your complaint. As discussed above, although hearsay (statements made by people outside the hearing) may be admissible, there needs to be a showing that the hearsay is reliable. Therefore, it is always better to get witnesses who were present at the time of an event.

For example, you may want to ask questions about the events at an IEP team meeting. The following sample questions show how to ask questions when the witness is first called and then show how to establish that the witness was present:

- Q: What is your name?
- Q: Do you know [child's name]?
- Q: How do you know [child's name]?
- Q: Have you attended any IEP's for [child's name]?
- Q: Did you attend the IEP on [date]?

The above sample establishes that the witness has knowledge of what they are going to testify about, for example, your child and what happened at an IEP. The remainder of your questions should focus on the basics: who, what, when, where and why, depending on the facts that you think you need to prove your case.

For example:

- Q: Who was at the IEP team meeting?
- Q: What did _____ say to you?
- Q: What did the IEP team discuss about [child's name] physical therapy needs?
- Q: Were you able to provide your input to the IEP team?

Expert Witnesses:

Some witnesses are called expert witnesses. Expert witnesses have knowledge about a topic like assessments given to disabled students.

Expert testimony can be used if it is helpful to the ALJ (who, in hearing your case will be deciding what facts are true) and is also given by a person with sufficient training to give an expert opinion.

To have expert opinion testimony, you may want to ask questions like the following:

- Q: What do you do for a living?
- Q: What is your educational background?
- Q: Have you received any other training in this area?
- Q: Do you know [child's name]?
- Q: How do you know him or her?
- Q: Do you have an opinion about [for example, recommended amounts of services, placing the student in a particular placement, etc....]
- Q: What is the basis for that opinion?

It should be noted that a witness does not need to be an expert to give an opinion about things that commonly happen in life.

IS THERE ANOTHER WAY TO GET TESTIMONY AND DOCUMENTS ADMITTED INTO EVIDENCE?

A *stipulation* is a substitute for testimony or documents. A stipulation is simply an agreement between the parties that documents are admissible or that certain facts are true. Stipulations have the same effect as evidence.

To see if the school district will stipulate, just ask their representative or attorney whether they would be willing to enter a stipulation about the documents or facts that you think are not disputed. They will likely be willing to stipulate to the authenticity of documents like IEPs or assessments conducted by the school district, which are easily proven to be accurate and authentic.

You can also stipulate to facts that are easily proven or not disputed such as: whether you live in the school district, eligibility (unless this is an issue in the case), where your child goes to school, when your child enrolled in the district, etc

You should always consider trying to obtain stipulations, as this makes it easier to present evidence on the facts that truly are disputed in the case. If you and the school district are able to stipulate, make sure that you put it in writing and submit the writing at the hearing.

The ALJ conducting the hearing will verify that the parties agree to the stipulation and will make sure that the stipulation is part of the record of the due process hearing.

HOW DO I OBJECT TO DOCUMENTS OR TESTIMONY?

Even though the technical rules of evidence do not apply at due process hearings, the evidence still needs to be shown to be relevant and reliable. Objections to evidence of testimony can be made.

The most common objections would be “lack of foundation” or “relevance.” “Lack of foundation” means a document has not been established to be authentic or that a witness does not have sufficient knowledge to testify about a subject. These types of objections can usually be overcome by asking more questions.

Another common objection is relevance. Relevant evidence is evidence having some tendency to prove or disprove a fact that is at issue in the case. If the ALJ asks you to argue why the evidence is relevant, try to explain how the fact you are trying to establish proves or disprove a fact relating to your claim.

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CHAPTER 9 – CHALLENGING THE ADMINISTRATIVE LAW JUDGE - PEREMPTORY CHALLENGE OR CHALLENGE FOR CAUSE

Due process requires an impartial tribunal for administrative hearings. Parties to a due process hearing are permitted to seek disqualification of an ALJ or other presiding officer from hearing an administrative case. There are two methods by which a party can seek

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disqualification of an ALJ – peremptory challenge and challenge for cause.

WHAT IS A PEREMPTORY CHALLENGE?

You have one peremptory challenge (disqualification without cause) of an ALJ assigned to an OAH hearing, provided that the challenge is timely made. You must do the following: (1) direct your letter to the Presiding Administrative Law Judge; (2) you or your attorney or authorized representative must send it; (3) it must be made in writing or orally on the record in substantially the form set forth in the regulation; (4) it must be served on all parties if made in writing; and (5) it must be filed within the required time limits.

The time limits for making a peremptory challenge are set forth in California Code of Regulations, title 1, section 1034:

(c) If, at the time of a scheduled prehearing conference, an ALJ has been assigned to the Hearing, any challenge to the assigned ALJ shall be made no later than commencement of that prehearing conference.

(d) Except as provided in (c), if the Hearing is to be held at an OAH regional office, the peremptory challenge of the assigned ALJ shall be made no later than 2 business days before the Hearing.

(e) Except as provided in (c), if the Hearing is to be held at a site other than an OAH regional office, the peremptory challenge of the assigned ALJ shall be made by noon on Friday prior to the week in which the Hearing is to commence.

In no event will a peremptory challenge be allowed if it is made after the hearing has commenced.

WHAT IS A CHALLENGE FOR CAUSE?

You can also seek to disqualify the ALJ for cause. Government Code section 11425.40, establishes the criteria for disqualification of the presiding officer and provides in relevant part that:

(a) The presiding officer is subject to disqualification for bias, prejudice, or interest in the proceeding.

(b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:

(1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.

(2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.

(3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

The case law in this area is well established that, with certain exceptions, bias and prejudice are not to be presumed and a factual showing of actual bias or prejudice is required.

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CHAPTER 10 - MOTIONS

WHAT IS A MOTION?

In the legal world, a “motion” is just a letter through which a party requests that the ALJ take some action prior to the due process hearing. Any party to the proceeding may file a motion with OAH. The ALJ’s decision or “ruling” on the motion will be sent to the parties in a document called an “Order.”

WHAT SHOULD A MOTION CONTAIN?

Because the due process hearing procedures are more informal than other types of legal proceedings and because these procedures are intended to be accessible to parents who are not represented by counsel, OAH does not require formality in motions filed by parties. You may write your motion in a letter and simply state what you want and the reasons why.

Your motion must also contain a statement that you sent a copy to the district (give name and address to whom sent) and any other parties at the same time you sent it to OAH. Give the name and address of the persons to whom you sent the document and state whether you mailed, hand-delivered or faxed that copy.

WHERE DO I FILE A MOTION?

Motions, as with all documents in a special education matter, are filed with the Sacramento OAH office. The request may be sent via facsimile (fax) to (916) 376-6319, hand delivered or mailed to the Office of Administrative Hearings, Special Education Division, 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833.

At the time you mail or fax your motion to OAH, you must mail or fax a copy of the motion to the district and any other parties. If an attorney represents the district or another party, you must send the copy to that attorney. The district and other parties, if any, will have three business days after they receive the motion to file a response with OAH and to send a copy to you or your representative.

HOW DO I RESPOND TO A MOTION FILED BY THE DISTRICT?

If the district files a motion, the district will send a copy to you or your representative. You will then have three business days to file a response with OAH to the district’s motion. You must provide the district and any other parties with a copy of your response. If you cannot file your response within the required timeline, you may write a letter to OAH, with a copy to the district, and request additional time to respond.

WHAT ARE SOME EXAMPLES OF MOTIONS?

- Notice of Insufficiency to challenge the sufficiency of the complaint. This is usually filed when there is a question as to whether the complaint has sufficient facts necessary to allow the district to respond to the complaint
- Motion to Continue the hearing dates
- Stay put motion to ensure your child remains in his last agreed upon and implemented placement while you resolve the dispute with the district
- Motion to Dismiss some of the issues in the complaint, or maybe even the entire complaint. Some of the commonly seen grounds for a Motion to Dismiss include:
 - issues alleged by the parent are not within the jurisdiction of OAH,
 - Student is not a legal resident of district, or
 - that the parents refused to participate in a resolution session convened by district.
- Motion to Amend the Complaint
- Motion to Set Hearing Dates - based on a district's failure to convene a resolution session within 15 days after the parent filed the complaint.
- Motion to Add Another Party - typically the district or parents request that OAH add as a party another school district or county mental health agency that may be responsible for providing special education services to the student.
- Motion to Consolidate - the district and parents may have filed separate complaints that involve similar issues. Instead of two separate hearings, either the district or parents will file a motion to consolidate both cases into one matter so that there is only one hearing.

WHAT IS A NOTICE OF INSUFFICIENCY

Federal and state law require that a complaint include the child's name, age, address and the school the child presently attends. Further, the complaint must include specific allegations regarding the nature of the problem, and a requested remedy. The law allows a party to challenge whether the due process complaint filed by the other party contains sufficient facts to support the claims.

A party has 15 days after receiving the complaint to file a NOI with OAH. If a party does not file a NOI within 15 days, the complaint will be considered sufficient. OAH has five days after it receives the NOI to issue an order. While the Party who files the complaint may submit a response, OAH will rule on the NOI whether it

receives a response or not because the ruling is to be made based on an analysis of the complaint itself in order to determine whether the complaint contains adequate allegations.

In ruling on an NOI, OAH does not consider whether the claims have merit or whether the Student will prevail. In addition, OAH does not consider, in ruling on an NOI, defenses such as whether the allegations are outside the two-year statute of limitations or barred by a previous settlement agreement.

If OAH determines your complaint to be sufficient, the mediation and hearing will proceed as indicated in the Notice of Hearing issued by OAH.

If OAH determines that your complaint does not contain sufficient allegations, OAH will cancel the mediation and hearing dates, and give the party who filed the complaint 14 days to submit to OAH and the other parties an amended complaint that contains sufficient facts.

Finally, OAH may issue an order that finds some allegations sufficient, and other allegations not sufficient. If OAH finds the complaint to be partially sufficient, the party who filed the complaint will be given 14 days to file an amended complaint that includes both the allegations found sufficient and additional facts to correct deficient allegations.

- If you do not file an amended complaint, all originally scheduled dates for hearing will remain on calendar and the matter will proceed on the issues that were determined to be sufficient.
- If a party files an amended complaint, OAH will cancel the mediation and hearing dates and send out a new Notice of Hearing with new dates for the Prehearing Conference and due process hearing.

Examples of insufficient allegations:

- The district denied student a FAPE by not providing Student with needed services.

This allegation is not sufficient because it does not identify the services (such as occupational therapy) that student requires, why student requires this service to receive FAPE, and when the district failed to provide student this service.

- The district failed to identify student as a child who requires special education services.

This allegation is not sufficient because it does identify when the district should have identified student as a child who might requiring special education and

the facts that put the district on notice that student might require special education services. Nor does it identify the alleged disability for the child.

- The IEP proposed by the district will not allow student to make some educational progress.

This allegation is not sufficient because it does not identify the specific IEP at issue, student's unique need (such as speech and language or reading deficits), the services, if any, the district offered, and why the district's offer is not adequate.

- The district did not assess student in all areas of suspected disability.

This allegation is not sufficient because it does not identify the areas of suspected disability, the assessment(s) that the district needed to conduct, and when this occurred.

- Student requires an Independent Educational Evaluation.

This allegation is not sufficient because it does not identify the assessment that the district conducted or failed to conduct, why the district's assessment is not adequate or why the district needed to assess student. It does not state when parents requested that the Independent Educational Evaluation and the district's response to the request.

MOTION FOR STAY PUT

Federal and state law requires that a Student remain in his or her last agreed upon and implemented educational program during the pendency of due process proceedings, unless the parties agree otherwise. This is known as stay put.

If you and the district cannot agree upon what constitutes the student's last agreed upon and implemented you may want to file a Motion for Stay Put. If you file a motion for stay put, you need to include in your motion a description of student's last agreed upon and implemented educational program, and the areas of dispute between you and the district regarding the educational program. You will also need to include a copy of the last agreed upon and implemented individualized education program with your motion (IEP).

MOTION TO AMEND COMPLAINT

If you want to amend your complaint to include new allegations, you must first get the approval of OAH (by motion requesting an amendment), except when OAH had already issued an order that permitted a party to file an amended complaint such as an order finding a complaint insufficient after a motion for NOI. The law permits a

party to amend the complaint before hearing if the party gets the approval from the other side to amend the complaint, or with the approval of OAH if the other side did not consent to the filing of the amended complaint. However, OAH can only grant a motion to amend a complaint no later than five (5) days before the due process hearing so you must file your motion to amend the complaint well before that hearing date. An amended complaint restarts all timelines including the thirty (30) day resolution meeting.

MOTION TO DISMISS THE COMPLAINT OR CERTAIN ISSUES WITHIN THE COMPLAINT

A motion to dismiss is different than a NOI because the ALJ may consider facts outside those alleged in the complaint, such as declarations and documents.

A motion to dismiss may seek to dismiss the entire complaint, or just selected parts of the complaint.

If OAH grants a motion to dismiss as to the entire complaint, OAH will cancel all hearing dates and close the matter.

The party whose complaint is dismissed may appeal the dismissal order to federal or state court. If OAH dismisses a portion of the complaint, only those parts of the complaint that OAH did not dismiss will proceed to hearing.

MOTION TO CONSOLIDATE

Both parents and the district may file separate complaints that involve similar questions of law and fact, such as whether the district needs to provide parents with an IEE or if a particular IEP provides Student with a FAPE.

Instead of having two hearings on similar legal and factual issues that involve the same witnesses and evidence, either parents or the district may make a Motion to Consolidate the two complaints. The motion needs to include both case numbers that the party wants consolidated and an explanation regarding the similar legal and factual issues as the reason why OAH should grant the request. If OAH grants the Motion to Consolidate, the order will state the case that will be the primary case to determine the start of the 45 day period for OAH to hear and issue a decision.

MOTION TO ADD A PARTY

If parents filed the complaint then the district may file a Motion to Add a Party to include another school district or public educational agency, such as the county mental health agency, who the district contends is wholly or partially responsible for the issues alleged in the complaint.

Additionally, if a district files a complaint, parents may file a Motion to Add a Party to include another educational agency.

A Motion to Add a Party is often filed if questions exist regarding a student's place of residency and which public educational agency is responsible for student's education.

The Motion to Add a Party is also filed when multiple public educational agencies are providing services to student or questions exist regarding the legal responsibility to provide services.

MOTION TO CONTINUE THE PREHEARING CONFERENCE OR DUE PROCESS HEARING (OR BOTH)

State and federal law require that a hearing be conducted and a decision rendered within 45 days from the end of the 30-day resolution period unless an extension is granted. Speedy resolution of the due process hearing is mandated by law and continuance of due process hearings may be granted only upon a showing of good cause.

An example of good cause for a continuance would include the parent's request for additional time to consult with, or to retain, an attorney. In the continuance request, the party must include dates when the party will be available for hearing.

CHAPTER 11 - LAWS THAT APPLY TO SPECIAL EDUCATION HEARINGS AND HOW TO FIND THEM

INTRODUCTION

In general, there are two sources of law that apply to special education cases: 1) statutes and regulations; and 2) decisions by courts or administrative agencies (like OAH) that either interpret statutes and regulations, or apply them to a particular set of facts. This section will give an overview of where to find both sources of law that apply to special education disputes. Each section will begin with a brief explanation of the law that applies, followed by information on how to find the law.

WHAT ARE SOURCES OF SPECIAL EDUCATION LAW?

Statutes and Regulations

Special education law comes from the Individuals with Disabilities Education Act (IDEA), a federal law that provides the State of California with some special education money if certain conditions are met. The IDEA begins at title 20 United States Code section 1400. The IDEA sets forth the categories of disability that qualify an individual for special education, the responsibility of school districts and others to provide a free and appropriate public education, the rights and responsibilities of parents or guardians, the types of placements and services that may need to be provided for students, and the procedures that apply when there is a dispute about special education eligibility or services. The United States Department of Education, which oversees giving federal money to the states for special education, has also developed regulations that apply to the implementation of the IDEA. The regulations begin at title 34 Code of Federal Regulations, part 300.1.

The State of California has its own set of statutes and regulations about special education. The state laws and regulations are generally consistent with the federal laws. They are found in the California Education Code, beginning at section 56000, and in title 5 of the California Code of Regulations, beginning at section 3000. The special education sections of the California Code of Regulations were developed by the State of California Department of Education to apply to the implementation of the IDEA. As a practical matter, the California Education Code and the California Code of Regulations are consistent with federal law, such that a parent or guardian who is not a lawyer may want to limit their research to California law.

Interpretations of Statutes and Regulations

As discussed above, statutes and regulations define the rights and responsibilities of students, their parents or guardians, and school districts and other agencies responsible for providing education. However, sometimes it is helpful to know how a particular statute or regulation has been interpreted or applied in the past. Like statutes and regulations, there are both federal and state sources of court decisions interpreting special education law. In addition,

another source of interpretation may be comments to the United States Department of Education regulations.

At the state level, the most often used sources are prior decisions of OAH. Additional interpretations are available through the state and federal courts. State courts include the California Court of Appeal or California Supreme Court. Federal court is divided into the United States District Court (the equivalent of a California Superior Court), the United States Court of Appeals (the equivalent of the California Court of Appeal), and the Supreme Court of the United States. District Court and Court of Appeals decisions are not always published, but even if not officially published are still available for the public to look at. All decisions of the Supreme Court are published.

Another possible source of information about the interpretation of the federal regulations is “comments” to the regulations. If the meaning of a regulation is not clear, the comments are sometimes looked at for guidance about what the United States Department of Education was intending when it published the regulations.

Finally, it is important to understand what cases are most persuasive. As a general rule, the decisions of the Supreme Court of the United States must be followed by everyone, making them the most persuasive. Second, decisions of the United States Court of Appeals are highly persuasive, and are even more persuasive when they come from the Ninth Circuit Court of Appeals, which includes cases from California. Cases from the United States District Court are less persuasive than the above, and even less so when they are not published. Finally, the decisions of OAH, or another state administrative agency, would be less persuasive, particularly if they have been overruled by one of the above courts. Don’t be surprised if you cannot find a case exactly like yours. In general, there is less published law on special education topics than other areas of law.

HOW CAN I FIND STATUTES, REGULATIONS AND DECISIONS?

There are two main sources for legal research: books and the internet. This section will set forth a list of places that you may want to go to obtain books, and a list of websites that provide access to materials about the IDEA and the statutes and regulations themselves.

In Books

Your local county law library may be able to provide statutes and caselaw in book form. Information about your county law library may be found at <http://www.publiclawlibrary.org/find.html> . This website also contains information about how to perform legal research.

Your local regional center may have a parent resource center that can help (and may also be able to help with advocacy if your child is a regional center client). You may find your local regional center on the internet at <http://www.dds.ca.gov/RC/RCList.cfm> or by contacting the

State of California Department of Developmental Services at 1600 Ninth Street, P. O. Box 944202, Sacramento, CA 94244-2020, Info: (916) 654-1690, TTY: (916) 654-2054.

“A Composite of Laws” - Published annually by the California Department of Education, this book contains all of the California statutes and regulations applicable to special education. It is free to parents of children with disabilities. It can be ordered by calling (800) 995-4099 or on the internet at <http://www.cde.ca.gov/re/pn/rc> .

On the Internet

<http://www.oah.dgs.ca.gov/Special+Education/Default.htm> is OAH’s website, which contains information about OAH procedures, links to special education law and access to prior special education decisions. When researching prior OAH decisions you will be asked to enter search terms.

<http://www.pai-ca.org/index.htm> is the website of Protection and Advocacy, Inc. (PAI), a non-profit whose mission includes assisting people with disabilities in advocating for their rights. <http://www.pai-ca.org/PUBS/504001SpecEdIndex.htm> provides access to PAI’s book “Special Education Rights and Responsibilities.”

<http://www.cde.ca.gov/sp/se/lr/> contains links to a searchable database of the California Education Code and California Code of Regulations and links to sources of federal special education law.

<http://www.ed.gov/news/fedregister/index.html> provides a link to the Federal Register, which publishes the Code of Federal Regulations.

http://www3.scoe.net/speced/laws_search/searchLaws.cfm offers a searchable database of California statutes and regulations.

<http://findlaw.com> is a website that offers free access to federal and state cases and statutes.

<http://www.leginfo.ca.gov/calaw.html> offers access to California statutes such as the Education Code.

<http://ccr.oal.ca.gov/linkedslice/default.asp?SP=CCR-1000&Action=Welcome> offers access to the California Code of Regulations.

<http://www.cde.ca.gov/sp/se/lr/> offers links to sources of information about California and federal law.

<http://idea.ed.gov/> provides information from the Federal Department of Education about the IDEA.

http://www.access.gpo.gov/nara/cfr/waisidx_02/34cfrv2_02.html provides the text of the Code of Federal Regulations sections relating to special education.

<http://www.supremecourtus.gov/opinions/opinions.html> offers access to cases decided by the Supreme Court of the United States.

HOW DO I DO LEGAL RESEARCH?

One of the first principles of legal research is “don’t reinvent the wheel.” What this means is that many sources of information have already been organized by someone else, which makes it easier on you. Thus, in general, it is always best to start with a source like a book or website that discusses special education law. The author or authors will generally have organized the information by topic and will have included the relevant law. Sources like books can help guide you to the statutes that will apply to your case so that you do not have to try to sift through all of the statutes on your own.

Another important principle is to be able to identify the key words that describe the dispute. Whether you are using a book or an internet resource, you will need to use key words to find information. For example, the first thing you should do when looking at a book about special education law or a book containing statutes is to consult the index or table of contents. Similarly, to access decisions, like those on the OAH website, you will need to plug in key words about your dispute.

To develop key words (also know as “search terms”), think about what the issue is in your dispute with the school district. For example, does your dispute involve how your child was assessed by the school district? If so then a key word would be “assessments.” If your dispute involved where your child is going to school, then you might want to use a key word like “placement” or “school.” If your dispute involved events that happened at an IEP, then you might want to use a keyword like “IEP” or “IEP meeting.” Another useful keyword is your child’s particular disability such as “autism” or “emotional disturbance.” Thus, to start your legal research, it is suggested that you make a list of key words about your dispute.

Once you have written out a list of keywords, use them to look through the index of books about special education law or books containing special education statutes. Usually this will point you to the law that applies to your problem. For online research, like finding prior decisions by OAH, use your keywords in the “search” box on the website. When looking for cases like prior OAH decisions, it is better to use more than one of your keywords. For example, putting in “IEP” in the search box will likely point you to all of the OAH special decisions. However, putting in “IEP,” with the additional terms “autism” and “applied behavioral analysis” would return a much smaller list of cases, that are likely to be more relevant to your particular dispute.

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